84-1806

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No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1985

EDWIN C. LAMPITT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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33 pp

I

QUESTION PRESENTED

Where a lieutenant in the United States Navy Dental Corps who had been on convalescent leave and who was then placed on temporary active duty solely for purposes of receiving medical treatment, and where such person is harmed solely as a result of Naval physicians' failure to retain the qualified civilian doctor as represented to the lieutenant, whether the lieutenant's claim brought under the Federal Tort Claims Act is barred by the Feres doctrine?

II

PARTIES INVOLVED

1. EDWIN C. LAMPITT, petitioner-plaintiff.

2. UNITED STATES OF AMERICA, respondent-defendant.

III

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OPINIONS BELOW

1. Lampitt v. United States of America, 585 F.Supp. 151 (E.D. Mo. 1984), Case No. 283-156C. See Appendix.

2. Lampitt v. United States of America, ___F.2d___ (8th Cir. 1985), Case No. 85-1652. See Appendix.

V

TABLE OF AUTHORITIES

Supreme Court Cases

Brooks v. United States, 337 U.S. 49 (1949).

Feres v. United States, 340 U.S. 135 (1950).

Stencel Aero Engineering Corp v. United States, 431 U.S. 666 (1977).

District Court Cases

Fisher v. United States, 451 F.Supp. 918 (E.D.N.Y. 1978).

Circuit Court Cases

Parker v. United States, 611 F.2d 1007 (5th Cir. 1980).

VI

JURISDICTION

The judgment of the Court of Appeal was filed on February 1, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

VII

STATUTES INVOLVED

§2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal

injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General

or other head of a federal agency shall not be competent evidence of liability or amount of damages.

§1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated

or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7425, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

VIII

STATEMENT OF THE CASE

While a lieutenant in the United States Navy Dental Corps, petitioner

Edwin C. Lampitt was diagnosed as having an acoustic neuroma that caused a loss of hearing. Petitioner Lampitt entered the Navy Regional Medical Center in San Diego, California, for surgery. On February 14, 1979, he was operated on for the removal of the acoustic neuroma. This surgery was performed under the supervision of Dr. Jerald Robinson, a civilian physician, who was one of the few specialists in acoustic neuroma surgery in this country. After surgery, Lampitt was placed on convalescent leave on February 23, 1979.

Less than one month later, a Navy physician suggested that additional surgery should be performed, although it was never required or ordered. On March 13, 1979, Lampitt was readmitted to the hospital pursuant to temporary active duty orders for treatment. Lampitt assumed Dr. Robinson had authorized the surgery and believed, based on a Navy

physician's representations, that Dr. Robinson would participate in and supervise the second operation. In fact, Dr. Robinson was not even contacted about the second operation until the evening before surgery was scheduled. He could not participate, but Lampitt was never told. Lampitt went into surgery believing that Dr. Robinson would be in the operating room.

Surgery was performed on March 14, 1979, for the removal of the remaining portion of the tumor. The second surgery was done without the guidance and supervision of Dr. Jerald Robinson, even though Lampitt insisted on and was assured of Dr. Robinson's participation by a Navy physician. Two Navy physicians performed the second surgery without the supervision of Dr. Robinson. Had Lampitt known that Dr. Robinson did not recommend the second operation and that Dr. Robinson would not be present, Lampitt

would not have undergone the surgery. Lampitt also was never informed that a possible outcome of the surgery might include paralysis.

Nevertheless, as a result of the second surgery on March 14, 1979, Lampitt suffered the following disabilities: right facial hemiparalysis; left body paralysis; severe left hemiparesis with complete dysfunction of the fifth, sixth, seventh and eighth cranial nerves on the right side; corneal scar of severe proportion, resulting in legal blindness to the right eye; loss of hearing in the right ear; and decreased hearing in the left ear.

Lampitt was later placed on the temporary disability retirement list with a disability rating of 80 percent.

Lampitt brought a Federal Torts Claim Act action against respondent United States of America, claiming that Navy physicians, acting within the scope

of their employment, negligently performed surgery on him without his informed consent on March 14, 1979, and that his injuries would not have occurred if a civilian specialist had participated, as had been represented to him.

Pursuant to 28 U.S.C. §2675, Lampitt filed a claim for his disability with the United States Navy on March 9, 1981, which was denied by the Department of the Navy on December 22, 1982. Within six months after the denial of his claim and after exhausting his administrative remedies, Lampitt filed suit in the district where he was domiciled on June 16, 1983.

The United States' answer was filed on or about August 22, 1983. On September 28, 1983, the United States filed its motion for summary judgment and supporting memorandum based upon the Feres doctrine (certain claims by members

of the military are barred). On March 19, 1984, the Honorable H. Kenneth Wangelin held that Lampitt's action be dismissed for lack of subject matter jurisdiction.

Lampitt appealed the decision to the Eighth Circuit, which, in a per curiam opinion, affirmed the lower court's decision.

IX

ARGUMENT

The Court should grant the writ in this case because the lower courts improperly applied the Feres doctrine to a case whose facts give rise to an exception to the doctrine.

The Federal Tort Claims Act (FTCA) allows civil actions against the United States:

> "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment,

> under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346(b).

In Feres v. United States, 340 U.S. 135 (1950), however, the United States Supreme Court held that certain claims by members of the military were barred. The court stated that the "government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146. In Stencel Aero Engineering Corporation v. United States, 431 U.S. 666 (1977), the Supreme Court identified the three bases on which the Feres doctrine is grounded: first, the "distinctly federal" character of the soldier-sovereign relationship; second, the presence of an alternative statutory compensation scheme (Veterans' Benefits Act, 38 U.S.C. §321 et seq.); and third,

the adverse effects that tort liability and litigation might have on military discipline. See 431 U.S. at 671-672.

Nevertheless, the mere donning of a uniform and military status does not deprive a serviceman of an FTCA claim. Brooks v. United States, 337 U.S. 49, 51 (1949). In Miller v. United States, 643 F.2d 490, 494 (8th Cir. 1981), the court did "not hold that every action for injuries sustained by an active duty serviceman while on base is barred by Feres, though the weight of authority tends toward that conclusion." 643 F.2d at 493. Rather, the court determined that "the better jurisprudential course, in our view, is to examine the facts of each case as they arise and determine whether they fall within the reasons given by the Supreme Court for its conclusion in Feres." 643 F.2d at 493.

In Fisher v. United States, 451 F.Supp. 918 (E.D.N.Y. 1978), the court stated:

> "The Feres case carved out a residual area of sovereign immunity from the broad terms of the consent to suit provided by the Tort Claims Act. Where the rationales for the holding of that case are not present, there is no reason to find the United States immune." 451 F.Supp. at 921.

Lampitt, in entering the hospital for the second time, was submitting himself primarily to the care of Dr. Robinson, a civilian specialist, not the Navy surgeons, intending to avail himself of civilian-related medical treatment. Clearly, when entering the hospital for the second surgery, Lampitt was entering into a civilian physician-patient relationship and not into the special relationship between a soldier and his superiors.

Furthermore, solely because Lampitt was operated on in a military hospital

should not be determinative of whether a military relationship existed and whether the injury was "incident to military service." As the Fifth Circuit stated in Parker v. United States, 611 F.2d 1007 (5th Cir. 1980):

> "[O]ne point does emerge...as a caution to those seeking to find meaning in the phrase 'incident to military service.' The test is not a purely causal one: one cannot merely state that but for the individual's military service, the injury would not have occurred. [United States v.] Brown [348 U.S. 110 (1954)] is exemplary. The claimant had injured his knee while in the service and after discharge had received negligent treatment of the knee at a V.A. hospital. But for Brown's military service, he would neither have hurt his knee nor had been at a V.A. hospital. Nevertheless, the Supreme Court recognized his right to recover against the government.... Therefore it is insufficient to aver that but for Parker's military service, he would not have been at the scene of the collision." 611 F.2d at 1011.

Lampitt's status should not be characterized as "active duty." Prior to

the second operation, which is the subject of this suit, he was on convalescent leave. Such leave "is the term used to describe a period of authorized absence granted to persons while under medical care which is part of the care and treatment prescribed for a member's recuperation or convalescence." Department of the Navy, The Naval Military Personnel Manual, Article 3020050(6) (effective 1976; reissued 1981). On his admission to the hospital on March 13, 1979, Lampitt was placed on temporary duty solely for the purposes of treatment. His orders specifically provided that the nature of the duty was "treatment." His treatment was to be supervised by a civilian physician. Certainly, he was not subject to orders while on the operating table. Lampitt's duty status did not place him in a special relationship to his military superiors. This case simply does not

concern "an injury sustained by a soldier on duty." Stencel Aero Engineering Corporation v. United States, 431 U.S. at 673.

Lampitt was neither on a military mission nor acting pursuant to orders when he entered the hospital to be operated on. In entering the hospital Lampitt was not under the immediate supervision of his military supervisors or involved with the military mission of the base---he was entering the hospital for personal reasons. He was admitted to the hospital for the purpose of treatment only under the primary supervision of a civilian physician. After the operation, he was placed back on convalescent leave. He was no more subject to call for active duty than a serviceman on furlough. A serviceman on furlough is subject to recall, yet he has an FTCA claim if injured. To contend that he was subject to call for active duty while in the

hospital and during the operation defies reality.

CONCLUSION

The relationship into which Lampitt was entering did not create that peculiar and special relationship to his military superiors. His injuries are not service-connected, and are not incident to service. None of the Feres doctrine rationales operates to bar Lampitt's claim. Accordingly, the writ should be allowed.

X

APPENDIX

See attachments:

District Court order and opinion.

Appellate Court opinion.

Respectfully submitted,

DATED: April 2, 1985

McINNIS, FITZGERALD,
REES, SHARKEY &
McINTYRE

By _____
CHARLES W. REES, JR.,
Attorneys for
Petitioner,
EDWIN C. LAMPITT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 84-1652

EDWIN C. LAMPITT,	)	
	)	
Appellant,	)	On Appeal from the
	)	United States
vs.	)	District Court for
	)	the Eastern Distict
UNITED STATES OF AMERICA,	)	of Missouri.
	)	
	)	
Appellee.	)	
	)	

Submitted: January 14, 1985

Filed: February 1, 1985

Before BRIGHT, ARNOLD, and BOWMAN, Circuit Judges.

PER CURIAM.

Edwin C. Lampitt brought this action against the United States under the Federal Tort Claims Act, 28 U.S.C. §1346(b) (1982). He claimed that Navy physicians performed surgery on him

without the assistance of a civilian doctor, Dr. Jerald Robinson, after Lampitt insisted on and was assured of Dr. Robinson's supervision. Lampitt argues that the surgery was negligently performed because Dr. Robinson did not supervise or participate. The District Court[1] dismissed plaintiff's claim because of the Feres doctrine, Feres v. United States, 340 U.S. 135 (1950), which provides that the government is not liable under the FTCA for injuries to servicemen arising out of and incident to military duty. We affirm.

Lampitt argues that his injuries did not arise out of activity incident to service. He says that when his injury occurred he was on convalenscent leave, and not on active duty. He compares his status to those of plaintiffs in United

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[1]The Hon. H. Kenneth Wangelin, Senior United States District Judge for the Eastern District of Missouri.

States v. Brown, 348 U.S. 110 (1952); Johnson v. United States, 704 F.2d 1431 (9th Cir. 1983); and Parker v. United States, 611 F.2d 1007 (5th Cir. 1980). But neither Brown, Johnson, nor Parker involved a serviceman on active duty complaining of negligent surgery by military doctors in a military hospital. The closest case is Brown, but it is distinguishable because Brown was a veteran, no longer subject to the control of the military.

The two companion cases to Feres, Griggs v. United States and Jefferson v. United States, were medical malpractice cases, and no recovery was allowed. The courts have adhered to the view that surgery on servicemen by military doctors is included within the Feres doctrine. See, e.g., Alexander v. United States, 500 F.2d 1, 5 (8th Cir. 1980). Plaintiff contends that since he was on

convalescent leave, he was not subject to the commands of superiors. He received orders and assignments, however, even while on convalescent leave.

He also argues that he is not specifically attacking the negligence of the Navy doctors, but rather contending that the surgery was without informed consent; had he known that Dr. Robinson would not participate, he would not have had the surgery. We do not see the distinction. The bottom line is that he seeks recovery for injury caused by the Navy doctors' negligence, both in their own conduct of the surgery and in their failure to secure the participation of Dr. Robinson. For that he cannot recover. The District Court's judgment is

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

SOUTHEASTERN DIVISION

[F I L E D
MAR 19 1984
EYVON MENDENHALL
U.S. DISTRICT COURT
E. DISTRICT OF MO.]

EDWIN C. LAMPITT,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. S 83-156 C
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

ORDER

In accordance with the memorandum of this Court filed this date and incorporated herein,

IT IS HEREBY ORDERED that this matter be and is DISMISSED for lack of subject matter jurisdiction.

Dated this [19th] day of March, 1984.

[H. Kenneth Wangelin]
H. Kenneth Wangelin,
United States
District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF MISSOURI

SOUTHEASTERN DIVISION

[F I L E D
MAR 19 1984
EYVON MENDENHALL
U.S. DISTRICT COURT
E. DISTRICT OF MO.]

EDWIN C. LAMPITT,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. S 83-156 C
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM

This matter is before the Court upon defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 56. For the reasons set forth below, the Court finds summary judgment to be inappropriate, but will nevertheless dismiss the action for lack of subject matter jurisdiction. Plaintiff seeks to bring this action pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671 et. seq. alleging medical malpractice and

failure to obtain informed consent on the part of two Navy physicians.

The material facts are not in dispute. Plaintiff entered the Navy in 1969, was released in 1972, and in 1977 was re-admitted as a Lieutenant in the Navy Dental Corps. From 1969 through 1979 he experienced progressive hearing loss, and in September 1978 was diagnosed by Navy physicians as having acoustic neuroma. On February 14, 1979, he underwent an operation at the Navy Regional Medical Center (NRMC) in San Diego for removal of the acoustic neuroma. The surgery was performed by a civilian surgeon, Dr. Jerald Robinson, and by at least three (3) Navy surgeons.

Subsequently one of the Navy surgeons, Dr. Lance Altenau, recommended to plaintiff that he undergo additional surgery for removal of the remaining portion of the acoustic neuroma. Plaintiff was informed that the surgical

team would be the same as for the prior operation, and would include Dr. Robinson; on the basis of that representation, plaintiff decided to undergo the additional surgery.

Plaintiff underwent the second surgery on March 14, 1979. However, Dr. Robinson was not present because he received notice of the planned surgery only at the last moment and was unable to rearrange his schedule. The surgery was nevertheless performed, and subsequent to the surgery plaintiff suffered various disabilities including partial paralysis, loss of hearing and blindness in one eye. Plaintiff states by way of affidavit that he agreed to the second surgery only on the condition that Dr. Robinson, an expert in the field, would be present. Plaintiff now seeks to prove that his disabilities are a result of the negligence of the Navy surgeons in performing the second operation, and of

their failure to obtain plaintiff's consent to undergo the surgery without the presence of Dr. Robinson.

Plaintiff was at all relevant times on active duty status in the United States Navy, until he was placed on the Temporary Disability Retired List (TDRL), effective August 1, 1979. (Aff. of William Crane; Pl. Ex. C). He received Temporary Additional Duty (TEMADD) orders, effective February 9, 1979, assigning him to the NRMC for treatment (Pl. Ex. E). On February 23, 1979 he received additional TEMADD orders authorizing twenty-one (21) days convalescent leave prior to returning to his regular duty station (Pl. Ex. D). While still on convalescent leave, however, he was issued TEMADD orders on March 13, 1979 reassigning him to the NRMC for the additional surgery (Pl. Ex. F). On April 13, 1979 he received orders for further assignment after an

additional thirty (30) days convalescent leave (Pl. Ex. I). At all times he was under active duty orders, and was subject to the authority of his commanding officer by virtue of his active duty status (Aff. of William Crane, at 2).

Defendant seeks summary judgment on the grounds that the suit is barred by the Feres doctrine. Feres v. United States, 340 U.S. 135 (1950). This doctrine, a judicially created exception to the FTCA, precludes members of the armed forces from maintaining an FTCA action for injuries where the "claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces," 340 U.S. at 138. Since such a defense is premised on the notion that the FTCA does not grant the Court jurisdiction to decide such a matter, it is appropriately raised in a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R.

Civ. P. 12(b)(I). See Stanley v. Central Intelligence Agency, 639 F.2d 1146, 1157 (5th Cir. 1981). Accordingly, the Court will so consider the present motion.

The Feres court held that the government is not liable under the FTCA "where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146. Thus, jurisdiction in the present case turns on whether plaintiff's medical treatment should be considered "incident to service" under Feres. The law in this circuit gives a broad reading to the "incident to service" test. Alexander v. United States, 500 F.2d 1, 5 (8th Cir. 1974), cert. denied, 419 U.S. 1107 (1975). However, the mere fact that the injury was sustained while the serviceman was on active duty and on base does not render Feres applicable per se. Miller v. United States, 643 F.2d 481, 493 (8th Cir. 1981). Rather the Court must apply

the facts of each case to determine whether the rationale behind the Feres doctrine applies. Id.

There are three principal policy grounds behind the Feres decision. First, the relationship between the government and members of its Armed Forces is "distinctly federal in character"; hence liability should not be made to depend on the fortuity of where a soldier is stationed. Second, the Veterans Benefits Act establishes a comprehensive scheme for compensation of servicemen without regard to liability. Finally, there is a "peculiar and special relationship" between a soldier and his superiors, grounded in discipline and military duty, that must be supported. See generally Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 671-72 (1977).

Applying the above considerations, the Court concludes that the facts of

this case bring plaintiff within the scope of Feres. At the time of the alleged improper actions by the Navy doctors, plaintiff was on active duty and assigned to the medical center for treatment. Knoch v. United States, 316 F.2d 532 (9th Cir. 1963). Immediately prior to and after the operation he was on convalescent leave, a status granted for the sole purpose of permitting recovery, during which he was subject to recall for duty, and to military law and discipline. Further, his presence in the military hospital and access to treatment provided by the military was based solely upon privileges to which he was entitled as a serviceman. Chambers v. United States, 357 F.2d 224, 229 (8th Cir. 1966); see also United States v. Carroll, 369 F.2d 618, 621 (8th Cir. 1966); Shults v. United States, 421 F.2d 170 (5th Cir. 1969). Hence, plaintiff's injuries occurred at a time which the "peculiar

and special relationship" to the military was in effect.

Other factors also support barring recovery. Since this is a tort action, appropriate state law would have to be applied to determine liability, thus emasculating the policy of uniform rules of liability. Further, plaintiff by his own admission is entitled to and is receiving benefits for injuries he incurred in the service. Thus, there appear to be no policy grounds for abrogating the well-established Feres rule.

This result is supported by considerable precedent in cases where servicemen have sued the government for medical malpractice. See, e.g. Harten v. Coons, 502 F.2d 1363 (10th Cir. 1974); Peluso v. United States, 474 F.2d 605 (3d Cir. 1973); Shults v. United States, 421 F.2d 170 (5th Cir. 1969). The fact that the surgery was elective does not alter

the result. Alexander v. United States, 500 F.2d 1 (8th Cir. 1974); Lowe v. United States, 440 F.2d 452 (5th Cir.), cert. denied, 404 U.S. 833 (1971).

Plaintiff attempts to distinguish his case from the above cases by couching his assertions in non-military terms. Plaintiff argues that he agreed only to submit himself to the care of Dr. Robinson, a civilian, and not to the care of the Navy surgeons. Thus, he agrues [sic], he did not "choose" to avail himself of the miliary [sic] medical service, but only to a civilian surgeon. He therefore concludes that his claim "in no manner stems from his use of facilities or from any privilege to use the facilities because he was a serviceman" (Pl. Memorandum, at p. 7).

Plaintiff's argument is nothing more than a futile exercise in semantics. Fairly read, his complaint asserts a claim against the United States for the

wrongful acts of its employees, two military surgeons, while plaintiff was under the care and control of a military medical facility. The alleged wrongful acts include failure to obtain informed consent to proceed with the operation without Dr. Robinson present, and negligent performance of the surgery. Regardless of how plaintiff articulates that claim, it is still one that arose while he was on active duty and not on furlough, while he was voluntarily availing himself of military medical treatment in a military medical facility, and as a result of alleged malfeasance of military officers in the conduct of that medical treatment. It is difficult to conceive of medical treatment more clearly "out of or in the course of activity incident to service" within the meaning of Feres. Thus whatever happened to him during the course of that

treatment is also incident to service. Lowe v. United States, 440 F.2d at 453.

In view of the above considerations, the Court finds that the FTCA does not grant subject matter jurisdiction to hear this claim. Since there is no other basis for jurisdiction asserted, the case must be dismissed.

Dated this [19th] day of March, 1984.

[H. Kenneth Wangelin]
H. Kenneth Wangelin,
United States
District Judge